IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 18TH JANUARY 2007 / 28TH PAUSHA 1928

CRP.No. 1580 of 1998(E)

AGAINST THE ORDER DATED 27/07/1998 IN EP 889/96 IN OS.1660/1983 of IIIrd ADDL.MUNSIFF'S COURT, TRIVANDRUM

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REVN. PETITIONER: ADDL.JUNDGMENT DEBTOR

D.PRABHAVATHY, T.C.NO.123/61,
MANGALATHU PUTHEN VEEDU,
VALIYASALA, THIRUVANANTHAPURAM.

BY ADV. SRI.R.S.KALKURA

RESPONDENTS: JUDGMENT DEBTORS.

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1. **NARAYANI AMMA LALITHAMMA,**
   RESIDING AT THEKKEKARA,
   PUTHEN VEEDU, THIRUMALA , ANAMADA VILLAGE.

2. **P.VEGNUGOPALAN NAIR, T.C.23/61,**
   MANGALATHU PUTHEN VEEDU.
   VALIYASALA, THIRUVANANTHAPURAM.

3. **T.DEVAKI AMMA (DIED), -DO- -DO-**

4. **SIVANKUTTY NAIR, -DO- -DO-**

5. **D.RAJESWARIAMMA, DO- -DO-**

6. **P.CHANDRASEKHARAN NAIR, -DO- -DO-**

BY ADV. SRI.L.MOHANAN

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 18/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON CMP. NO.3187/1998 IN CRP. 1580/1998

DISMISSED

18.1.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

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M.Sasidharan Nambiar,J.

C.R.P.No.1580 of 1998

Dated this the 18th day of January, 2007

O.R.D.E.R

Petitioner is third judgment debtor and first respondent decree holder in O.S.1660/83 on the file of Addl.Munsiff Court, Thiruvananthapuram. A suit was filed for redemption of registered mortgage deed 3912/72 dated 28.3.72 executed by deceased second defendant and her son the second respondent. On the death of second defendant, petitioner and respondents 4 to 6, the other children were impleaded as her legal heirs. In the suit, additional defendants, who were impleaded on the death of second defendant, filed a written statement contending that they are kudikidappukars entitled to protection of Kerala Land Reforms Act. Though an issue regarding kudikidappu was framed that question was not referred to the Land Tribunal and no finding was entered into, holding that that the question has to be decided in the

execution proceedings. Subsequently a decree for redemption and recovery of possession was granted. First respondent filed E.P.889/96 for execution of the decree. In the execution petition only third judgment debtor/ petitioner filed objection. It was contended in the objection that she is a kudikidappukari entitled to protection of Kerala Land Reforms Act and as the question was not decided by the trial court and was left open to be decided in the execution stage, it is to be referred to the Land Tribunal as provided under section 125(3) of Kerala Land Reforms Act. The executing court following the decision of Apex Court in **Victoria v. K.V. Naik & Others (1997(6) SCC 23)** held that, the question of Kudikidappu will not arise at the execution stage and overruled the objection. This revision petition is filed challenging that order under section 115 of the Code of Civil Procedure.

2. Learned counsel appearing for petitioner

and first respondent were heard.

3. The argument of learned counsel appearing for petitioner was that as settled by this court in various decisions, question of kudikidappu raised by a mortgagee in a suit for redemption has to be decided only at the execution stage and therefore executing court is bound to refer the question of kudikidappu raised by petitioner to the Land Tribunal and decide the question in accordance with the finding. It was argued that Explanation III and IV to section 2(25) of Kerala Land Reforms Act enables a mortgagee on redemption of mortgage, to claim kudikidappu right and therefore finding of executing court is unsustainable. Relying on the decision of a learned single Judge of this Court in **Janaki Padmakshi v. Saraswathi & another (2000 (1) K.L.J.453)** it was argued that, the facts therein are identical and as in that case though an issue regarding the plea of kudikidappu was raised before the trial court, it was not decided and left

opened to be decided at the execution stage and after considering the decision of Apex Court in **Victoria's case (supra)** it was held that the question is available to be decided at the execution stage. It was argued that the impugned order is to be set aside. Relying on the decision in **Balakrishnan v. Bhaskaran (1987(2) K.L.T.733)** it was argued that interpreting sub section (25) of Section 2, a Division Bench of this Court held that question of kudikidappu will arise only at the execution stage as Explanation IV to sub section (25) of Section 2 provides, at the time of redemption and therefore the finding of the court below is to be set aside.

4. Learned counsel appearing for respondent relying on the decision of the Apex Court in **Victoria's case(supra)** argued that the decision applies not only to a case where the question of kudikidappu was raised and decided, but also to a case where it was left opened to be decided at the

execution stage. It was also argued that Their Lordships of the Supreme Court held that in equity justice and good conscience, a mortgagee is not entitled to claim kudikidappu right and therefore the finding of the executing court is perfectly correct and there is no illegality or irregularity warranting interference.

5. Learned counsel relying on the decision of another learned single Judge of this Court in **Vidhyadharan v. Sivadas (2001(2) KLT 605)** argued that this court followed the law in Victoria's case, overruling the objection raised by mortgagee in that case that the decision is contrary to Explanation IV of sub section (25) of Section 2 declaring that the decision of the Apex Court is the law of the land as mandated under section 141 of Constitution of India and therefore there is no reason to interfere with the impugned order. Learned counsel relying on decision of another learned single Judge of this court in **Kunhambu v.**

Kunhammar(2000(1) KLT 490) argued that unless the ingredients of kudikidappukaran are specifically pleaded, the question of kudikidappu is not to be referred to the Land Tribunal as, it is only an evasive plea and as petitioner in the case did not plead the ingredients of Section 2(25), including that of Explanation III and IV, before the executing court or the ingredients of sub section (25) of Section 2 in the written statement, the plea does not arise for consideration and was rightly over-ruled by the executing court.

6. The Explanation III to sub section (25) provides that where any kudikidappukaran secures any mortgage with possession of the land in which the kudikidappu is situate, his kudikidappu right shall revive on the redemption of the mortgage,provided that he has at the time of redemption, no other homestead or any land exceeding three cents in any city or major municipality or five cents in any other municipality or ten cents in any panchayat area or

township, in possession either as owner or as tenant, on which he could erect a homestead. Explanation IV provides that where a mortgagee in possession erects for his residence a homestead, or resides in a hut already in existence, on the land to which the mortgage relates, he shall, notwithstanding the redemption of the mortgage, be deemed to be a kudikidappukaran in respect of such homestead or hut, provided that at the time of redemption he has no other kudikidappu or residential building belonging to him or any land exceeding the area provided thereunder, either as owner or as tenant on which he could erect a homestead and his annual income does not exceed two thousand rupees. Both Explanation III and IV make it clear that the entitlement of a mortgagee would arise only at the time of redemption of mortgage. Therefore the question whether the mortgagee claimed kudikidappu at the trial stage and whether it was considered and negatived, may not be very relevant to consider the question whether a

mortgagee is entitled to the benefit provided under Explanation III or Explanation IV.

7. Apex Court in **Victoria's case** wasconsidering a plea raised by a defendant in a suit for redemption of mortgage claiming right of kudikidappu. The trial court negatived the contention raised by the mortgagee and passed a final decree. The court found that in a suit for redemption of mortgage kudikidappu advanced by mortgagee arises for consideration, only at the time of execution stage and therefore question need not be referred to the Land Tribunal under section 125(3) of Kerala Land Reforms Act. Though petitioner raised the point in the execution stage,holding that constructive res judicata operates, it was negatived. The matter was challenged before the Apex Court by special leave. Considering the Division Bench decision of this Court in **Balakrishnan's case (supra)**that a right of redemption vested in a mortgagor can be extinguished either by an act of parties or by

decree of court and the making of deposit of mortgage money under section 83 of Transfer of Property Act does not ipso facto extinguish the mortgage where the mortgagee has refused to accept the deposit and if it is not accepted mortgage does not get extinguished and thereby parties continue to have the relationship of mortgagor and mortgagee and the plea of kudikidappu raised under section 2 (25) and the further plea that the question has to be referred under section 125(3) are to be considered in a suit for redemption, their Lordships held that latter part of the view taken by the Division Bench is not correct for the reason that if the plea has not been raised, it operates as constructive res judicata on the principles of "might and ought". It was also held that if it is taken and rejected it operates as res judicata and the same, cannot be raised in execution. It was further held that even if it is left open in equity justice and good conscience, it must not be extended to the mortgagee. Holding that after all

the mortgagee money lender comes into possession of the property as mortgagee and always remains a mortgagee, unless limitation snaps of the link, it was held that he cannot be permitted in good sense of law to eat away the cake as kudikidappu. Finally it was held that as the plea had been raised and negatived in the suit and the preliminary decree had been passed followed by the final decree ,it was not open to the mortgagee to raise the plea after passing of the final decree that he was entitled to 3 cents of land as kudikidappu.

8. That decision cannot be made applicable to a case where the plea of kudikidappu has been raised by the defendant and trial court did not consider that question and left open to be decided at the execution stage, especially when Explanation III and IV enable the mortgagee to claim right of kudikidappu if otherwise entitled to because of satisfying the ingredients as provided under Explanation III and IV. A learned single Judge of this Court in **Janaki Padmakshi's case (supra)** has

taken the very same view on the decision of the Apex Court in **Victoria's case(supra).** The other learned single Judge in **Vidhyadharan's case(supra),** has also considered the decision of the learned single Judge in **Janaki Padmakshi's case(supra),** but did not follow the same as the facts in **Vidhyadharan's case** was identical to **Victoria's case, where** the question of kudikidappu was raised and negatived. Therefore the finding of the executing court relying on Victoria's case that petitioner is not entitled to claim kudikidappu is not sustainable.

9. Then the question is whether the question of kudikidappu raised by petitioner has to be referred to the Land Tribunal as canvassed by petitioner. Learned counsel appearing for petitioner vehemently argued that, that question was not considered by the executing court and executing court disallowed the plea to be raised and therefore executing court has to be directed to

consider the question. It was argued that exercising the revisional jurisdiction, this court is not to go into that question, before the executing court consider that aspect. Learned counsel appearing for respondent pointed out that apart from an evasive plea, the ingredients to claim the benefit under section 2(25) of Kerala Land Reforms Act were not pleaded and therefore though the plea has been raised, the plea does not arise for consideration. Relying on the decision of the Apex Court in **Thomas Antony v. Varkey (2000(1) KLT 12(SC)**it was argued that before considering the question whether the question of tenancy or kudikidappu raised by a party is to be referred to the Land Tribunal under section 125(3), the court has to consider whether there is bona fide in the plea or it, it is only an evasive plea. If the ingredients are not pleaded, it can only be held that the question will not arise for consideration and there is no necessity for a reference.

10. The question is whether for the mere reason that plea of tenancy or kudikidappu was raised by the tenant, the question is to be referred to the Land Tribunal is no more res integra. The Full Bench of this court in **Kesava Bhat v. Subraya Bhat (1979 KLT 766)** as well as by the Apex Court in **Thomas Antony v. Varkey (2000 (1) KLT 12)**settled the question. Only if the plea of kudikidappu or tenancy raised by the defendant arises for consideration, the question is to be referred to the Land Tribunal under section 125(3). Mere raising of the question, if the question does not arise for consideration, it cannot be referred.Before considering the question whether a reference is warranted or not, court has to consider whether the question of kudikidappu reasonably arises for a decision in the suit. If the plea raised was with an idea to "procrastinate or prolong the litigation" without any legal foundation and the court is of opinion that there

is not even a remote possibility of the plea being upheld, the civil court is not refer the question of tenancy to the Land Tribunal.

11. If the question of kudikidappu raised is to be referred to the Land Tribunal, petitioner shall atleast necessarily plead the ingredients to claim the benefit. Merely because the cost of construction of the , dwelling house or its rental value at the time of construction would be less than Rs.750/- or Rs.5/- a defendant cannot claim kudikidappu right . It is mandatory that he shall plead that he was not in possession either as owner or as tenant the requisite land on which he could erect a homestead. Similarly if a plea of kudikidappu, is to be raised at the time of redemption, relying on Explanation III or IV, the ingredients provided under the said Explanation are necessarily to be pleaded. To claim the benefit under Explanation III, a mortgagee has to plead that he is not in possession either as owner or as tenant the required extent namely 3 cents, 5 cents

or 10 cents respectively depending on the question whether it is city or municipality or panchayat on which he could erect a homestead at the time of redemption. If the claim is to be based on Explanation IV additionally he has to plead that his monthly income does not exceed Rs.2000/-. It is not disputed that neither in the written statement, nor in the objection submitted before the executing court, petitioner has raised a contention that she does not possess either as owner or as tenant, the required land where she could erect a homestead. If that be so, though petitioner had raised a plea of kudikidappu, the question does not arise for consideration and therefore the question is not to be referred to the Land Tribunal. Though the executing court did not consider this question, in view of the above findings, I do not find any reason to interfere with the order of the executing court over-ruling the objection raised by petitioner claiming benefit under section 2(25) of Kerala Land Reforms Act.

Civil Revision Petition is dismissed.

M.Sasidharan Nambiar
Judge

tpl/-

M.SASIDHARAN NAMBIAR, J.

CRL.R.P.NO. /97

ORDER

MARCH,2006